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IN THE SUPREME COURT OF THE UNITED STATES

(October Term, A.D. 1948)

No. 766

THE TRAVELERS FIRE INSURANCE COMPANY, a corporation,
Petitioner,

VERSUS

RANNEY-DAVIS MERCANTILE COMPANY, a corporation,
Respondent.

NEW YORK UNDERWRITERS INSURANCE COMPANY, a corporation,
Petitioner,

VERSUS

RANNEY-DAVIS MERCANTILE COMPANY, a corporation,
Respondent.

GRAIN DEALERS NATIONAL MUTUAL FIRE INSURANCE COMPANY, a corporation; PENNSYLVANIA MILLERS MUTUAL FIRE INSURANCE COMPANY, a corporation; MILLERS MUTUAL FIRE INSURANCE ASSOCIATION OF ILLINOIS, a corporation; MICHIGAN MILLERS MUTUAL FIRE INSURANCE COMPANY, a corporation; WESTERN MILLERS MUTUAL FIRE INSURANCE COMPANY, a corporation; and THE MILLERS MUTUAL FIRE INSURANCE COMPANY, a corporation,
Petitioners,

VERSUS

RANNEY-DAVIS MERCANTILE COMPANY, a corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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MAY, 1949.

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GRAIN DEALERS NATIONAL MUTUAL FIRE INSURANCE COMPANY, a corporation; PENNSYLVANIA MILLERS MUTUAL FIRE INSURANCE COMPANY, a corporation; MILLERS MUTUAL FIRE INSURANCE ASSOCIATION OF ILLINOIS, a corporation; MICHIGAN MILLERS MUTUAL FIRE INSURANCE COMPANY, a corporation; WESTERN MILLERS MUTUAL FIRE INSURANCE COMPANY, a corporation; and THE MILLERS MUTUAL FIRE INSURANCE COMPANY, a corporation,
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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Come now the petitioners, The Travelers Fire Insurance Company, a corporation, New York Underwriters

Insurance Company, a corporation, Grain Dealers National Mutual Fire Insurance Company, a corporation, Pennsylvania Millers Mutual Fire Insurance Company, a corporation, Millers Mutual Fire Insurance Association of Illinois, a corporation, Michigan Millers Mutual Fire Insurance Company, a corporation, Western Millers Mutual Fire Insurance Company, a corporation, and The Millers Mutual Fire Insurance Company, a corporation, and respectfully petition this Honorable Court to grant a writ of *certiorari* to review the opinion and decision of the United States Court of Appeals for the Tenth Circuit rendered and entered on the 25th day of March, 1949, in the above cases lately pending in said United States Court of Appeals for the Tenth Circuit, styled The Travelers Fire Insurance Company, a corporation, appellant, vs. Ranney-Davis Mercantile Company, a corporation, appellee, being No. 3795; New York Underwriters Insurance Company, a corporation, appellant, vs. Ranney-Davis Mercantile Company, appellee, being No. 3796, and Grain Dealers National Mutual Fire Insurance Company, a corporation, Pennsylvania Millers Mutual Fire Insurance Company a corporation, Millers Mutual Fire Insurance Association of Illinois, a corporation, Michigan Millers Mutual Fire Insurance Company, a corporation, Western Millers Mutual Fire Insurance Company, a corporation, and The Millers Mutual Fire Insurance Company, a corporation, appellants, vs. Ranney-Davis Mercantile Company, a corporation, appellee, being No. 3797 of causes on the docket of said United

States Court of Appeals for the Tenth Circuit, consolidated and tried as one cause in the United States District Court for the District of Kansas, Second Division, and, as consolidated, appealed to the United States Court of Appeals for the Tenth Circuit, affirming the judgment of said United States District Court for the District of Kansas, Second Division, in said causes in favor of the Ranney-Davis Mercantile Company, and against the petitioners herein, which said judgment and decision of the United States Court of Appeals for the Tenth Circuit became final by reason of the fact that no petition for rehearing was filed.

OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit in said causes as consolidated, which petitioners here seek to have reviewed, is not yet officially reported but appears on Pages 339 to 352, inclusive, of the transcript of the printed record filed herewith.

The opinion of the United States District Court was not reported but insofar as the decision of the United States District Court has to do with the questions here involved, the opinion of the Honorable Royce H. Savage, United States District Judge, holding that the policies were payable in the State of Kansas and therefore service of summons could be had upon the Insurance Commissioner as the statutory service agent of these petitioners and overruling the special appearances and motions to quash appears in the

printed transcript filed herewith (Tr. 38-39). The opinion of the United States District Judge Arthur J. Mellott, in passing upon the motion for new trial held that while he could not agree that the policies were payable in Kansas, yet, under his construction of the Kansas statute requiring the foreign insurance companies to appoint the Commissioner of Insurance that the court would have jurisdiction. This opinion appears in the printed transcript beginning on Page 69, and particularly on the subject of jurisdiction, transcript 70-71-72-73, and journal entry of judgment, transcript 79, which transcript of record is filed herein.

SUMMARY STATEMENT OF THE MATTERS INVOLVED

The material controlling facts are:

The actions were instituted in or removed to the United States District Court for the District of Kansas, Second Division, and in each case service of summons was had upon the Commissioner of Insurance of the State of Kansas, the statutory agent for service of summons upon each of the petitioners, defendants in the trial court. The Commissioner of Insurance was appointed as service agent of these petitioners at the time of their admission to do business in the State of Kansas by virtue of Title 40, Section 218, Kansas Statutes, requiring such appointment.

Ranney-Davis Mercantile Company, a Kansas corporation, many years ago was admitted to transact business in the State of Oklahoma and owned the building here involved, which was located on Lot 3, Block 58, in East

Woodward, City of Woodward, Oklahoma (Tr. 24). Your petitioners, and each of them, are fire insurance companies organized in States other than Kansas and Oklahoma and at all times of interest herein were each admitted to do an insurance business in the State of Oklahoma where the property insured was located and also in the State of Kansas where the actions were filed.

Ranney-Davis Mercantile Company, in the operations of its business in Oklahoma, maintained headquarters at Woodward, Oklahoma, and its Oklahoma business was transacted from that city. In the conduct of its business in Oklahoma, Ranney-Davis Mercantile Company purchased from petitioners policies of fire and extended coverage insurance (Tr. 13-33, inclusive). All of the policies were of the Oklahoma statutory form and each policy was executed and delivered by Oklahoma agents of your petitioners, covering property in Oklahoma and (Tr. 24) the assured is named as the Ranney-Davis Mercantile Company, Woodward, Oklahoma. The Oklahoma standard form fire insurance policy is provided for in Title 36, Sections 243-244, as amended by the Session Laws of Oklahoma 1945, Pages 127-133, inclusive.

On April 9, 1947, a tornado and fire occurred which damaged in part the building covered by each of the policies. Being a partial loss, the 90% co-insurance clause (Tr. 22) applied. Ranney-Davis Mercantile Company refused to consider the application of the co-insurance clause and instituted these suits in the State of Kansas, obtaining

service of summons upon your petitioners by serving summons upon the Commissioner of Insurance, the statutory agent for service of summons on each of your petitioners. The actions arose wholly out of business transacted in the State of Oklahoma and no part of respondent's causes of action arose out of or by reason of the transaction of any business in the State of Kansas.

Your petitioners each filed special appearances and motions to quash this service of summons. The motion of The Travelers Fire Insurance Company appeared in the printed transcript, Page 37, and is identical with the special appearances and motions to quash of the other petitioners, and each motion in the cases, as consolidated, raises the following points:

(1) That this movant is a corporation organized and existing under and by virtue of the laws of the State of Connecticut.

(2) That the purported service in this cause was directed to and served upon Frank Sullivan, Commissioner of Insurance of the State of Kansas, statutory service agent for this movant in the State of Kansas.

(3) That this movant, as a condition upon its doing business in the State of Kansas, was required to appoint the said Frank Sullivan, Commissioner of Insurance of the State of Kansas, its statutory service agent, and that such appointement is an appointment of a service agent only for the service of process in matters arising in the State of Kansas, or arising out of or by reason of business transacted in the State of Kansas.

(4) That the cause of action set forth in plaintiff's complaint is an action, if any, arising upon a policy issued in the State of Oklahoma, insuring property in the State of Oklahoma, and that no part of

the plaintiff's cause of action arises out of or by reason of the transaction of any business in the State of Kansas.

The overruling of these special appearances and motions to quash were assigned as error in the appeal to the United States Court of Appeals for the Tenth Circuit (Tr. 82-83), as follows:

> "(1) That the District Court of the United States, Second Division of Kansas, was without jurisdiction to hear and determine the issues herein and erred in overruling the special appearances and motions of the defendants, and each of them, to quash service of summons."

The decision of the United States Court of Appeals for the Tenth Circuit sustaining the jurisdiction of the United States District Court, Second Division of Kansas, and affirming the action of said court in overruling the special appearances and motions to quash of each of your petitioners was rendered on March 25, 1949, and said judgment became final. However, proceedings were stayed and an order staying mandate was entered on April 4, 1949 (Tr. 352).

The duly certified record, including all of the proceedings in said cause in said United States District Court for the District of Kansas, Second Division, and the United States Court of Appeals for the Tenth Circuit is filed herewith under separate cover.

JURISDICTION OF THIS COURT

The jurisdiction of this Court is invoked under Title 28, U.S. Code, Section 1254, and that portion of subsection

(b) of Rule 38 of the Revised Rules of the Supreme Court of the United States:

> "Where a Circuit Court of Appeals has rendered a decision in conflict with the decisions of another Circuit Court of Appeals on the same matter; or, has decided an important question of local law in a way probably in conflict with applicable local decisions; or has decided an important question of Federal law which has not been, but which should be, settled by this court; or has decided a Federal question in a way probably in conflict with applicable decisions of this court, or has so far departed from the accepted and usual course of jurisdictional proceedings, or so far sanctioned such departure as to call for an exercise of this court's power of supervision."

The cases originated in the United States District Court for the District of Kansas, Second Division, and were reviewed on appeal by the United States Court of Appeals for the Tenth Circuit and the decision of that court has become final but mandate stayed as aforesaid. The cases thought to sustain the jurisdiction of this Court to grant this writ of *certiorari* are as follows:

(1) As being in conflict with local law: *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. ed. 1188; *Rorick* v. *Devon Syndicate*, 307 U.S. 299, 83 L. ed. 1303; *Fidelity Union Trust Co.* v. *Field*, 311 U.S. 169, 85 L. ed. 109; *West* v. *American Telephone & Telegraph Co.*, 311 U.S. 223, 85 L. ed. 139; *Meredith* v. *City of Winter Haven*, 320 U.S. 228, 88 L. ed. 9; *Cities Service Oil Co.* v. *Dunlap*, 308 U.S. 208, 84 L. ed. 196.

(2) As being in conflict with the decisions of other Circuit Courts: *City of New York, petitioner* v. *Lewis H. Saper*, consolidated with two other cases, 335 U.S. 811, 93

L. ed. 571; *Commissioner of Internal Revenue* v. *Phipps*, 335 U.S. 807, 93 L. ed. 590; *Jungersen* v. *Otsby & Barton Co.*, 335 U.S. 560, 93 L. ed. 232; *Spiegel's Estate* v. *Commissioner of Internal Revenue*, 335 U.S. 701, 93 L. ed. 327.

(3) As being in conflict with the decisions of the Supreme Court of the United States: *Upshaw* v. *United States*, 335 U.S. 410, 93 L. ed. 129; *Halliburton Oil Well Cementing Co.* v. *Walker*, 329 U.S. 1, 91 L. ed. 3; *Cleveland* v. *United States*, 329 U.S. 14, 91 L. ed. 12; *United States* v. *Howard P. Foley Co.*, 329 U.S. 64, 91 L. ed. 44; *Globe Liquor Co.* v. *San Roman*, 332 U.S. 571, 92 L. ed. 177.

QUESTIONS PRESENTED

The questions presented by your petitioners in their petition for writ of *certiorari* are:

(1) The decisions of the United States Court of Appeals for the Tenth Circuit in the instant case are in conflict with the decisions of the Supreme Court of Kansas, in the following cases:

Shearer v. *Farmers' Life Ins. Co.*, 106 Kans. 574, 189 Pac. 648, in which case that court held that if there was no loss in Kansas and, there was no residence in Kansas, that the action could not be maintained. In this case the court said:

> "That statutes providing for service of summons upon a foreign corporation by the delivery of a copy to a public officer, are intended for the benefit of residents of the state and are not available to non-residents and *that in order for effective service to be in such manner, the cause of action must have arisen in the state.*"

Mutual Reserve Fund Life Ass'n v. *Boyer*, 62 Kans. 31, 61 Pac. 387, where the Supreme Court of Kansas, in discussing the case and construing the statutes providing for service upon the Insurance Commissioner, said:

> "With the withdrawal of the insurance company from the state, the subject matter in respect to which the power was conferred, to-wit, the business *here transacted by the company*, terminated; and with the probable exception above mentioned, the company ceased to be amenable to our jurisdiction."

Buchanan v. *Iowa State Live Stock Ins. Co.*, 108 Kans. 520, 196 Pac. 249, in which case the Supreme Court of Kansas quoted with approval the above quotation from the *Mutual Reserve Fund Association case.*

(2) The decision of the United States Court of Appeals for the Tenth Circuit in the instant case is in conflict with the decisions of the United States Court of Appeals for the Fifth Circuit in the following case:

Knobloch v. *M. W. Kellogg Co.*, 154 Fed. (2d) 45. In that case the United States Court of Appeals for the Fifth Circuit of Texas held:

> "There being no state decision on the subject, we reject the appellant's contention, and construe the Texas statute to apply only to causes of action arising within the state, or out of facts relating to business therein transacted."

(3) The decision of the United States Court of Appeals for the Tenth Circuit in the instant case is in conflict with the decisions of the Supreme Court of the United States in the following cases:

Simon v. *Southern Railway Co.*, 236 U.S. 115, 35 S. Ct. 255, 59 L. ed. 492, in which the court held that service of process on a state officer designated by the Louisiana statute for that purpose is not effective to give a court of that state jurisdiction of a suit against a foreign corporation doing business within the state as to a cause of action arising in another state.

Old Wayne Mutual Life Ass'n v. *Sarah McDonough*, 204 U.S. 8, 27 S. Ct. 236, 51 L. ed. 345. There the policy sued upon was executed in Indiana and the suit brought in Pennsylvania, the residence of the plaintiff, and personal judgment was entered against the Indiana corporation. Process was served upon the insurance commissioner. The Supreme Court of the United States, in holding that the judgment "was void as wanting in due process of law," said:

> "Conceding, then, that by going into Pennsylvania, without first complying with its statutes, the defendant association may be held to have assented to the service upon the insurance commissioner of process in a suit brought against it there in respect of business transacted by it in that commonwealth, *such assent cannot properly be implied where it affirmatively appears as it does here, that the business was not transacted in Pennsylvania.*"

Robert Mitchell Furniture Co. v. *Selden Breck Construction Co.*, 257 U.S. 213, 42 S. Ct. 84, 66 L. ed. 201. There the action was filed in Ohio against a Missouri corporation, involving property purchased and delivered in Michigan. This Court there said:

> "The purpose of requiring the appointment of such an agent is primarily to secure local jurisdiction in respect of business transacted within the state."

Morris & Company v. *Skandinavia Insurance Co.*, 279 U.S. 405, 49 S. Ct. 360, 73 L. ed. 762. The policy sued on there was issued in South America and suit instituted in Mississippi. In holding the service void, the Supreme Court of the United States said:

> "The purpose of state statutes requiring the appointment by foreign corporations of agents upon whom process may be served is primarily to subject them to the jurisdiction of local courts in controversies growing out of transactions within the state."

(4) The decision of the United States Court of Appeals for the Tenth Circuit, in the instant case, in the construction of the Kansas statute requiring the appointment by foreign corporations of the insurance commissioner as service agent, Title 40, Section 218, is contrary to the decisions above set forth.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

The final decision of this Court will have important results:

(1) The question of jurisdiction is of vast importance to the fire insurance companies and to the people generally. Foreign insurance companies should not be subjected to the jurisdiction of states other than where the transactions arose and this has been the policy of the Supreme Court of the United States, as shown by the decisions, *supra*.

(2) The United States Court of Appeals has declined to apply the plain terms of an unambiguous statute of Kansas with reference to the service of process upon foreign insurance companies by service of summons upon the insurance commissioner. The statute, as held by the Supreme Court of Kansas in the cases, *supra,* applies only to business transacted in Kansas. If it has been determined that the business was transacted in Kansas, then the question of venue arises under the statute and, when the action is properly brought in Kansas on business there transacted, the statute authorizes suit to be instituted in one of two places, either in the residence of the plaintiff or in the county where the cause of action arose.

The opinion in this cause wholly misconstrues said statute.

SPECIFICATIONS OF ERROR

Petitioners, and each of them, say that the United States Court of Appeals for the Tenth Circuit erred:

1. (a) In interpreting the Kansas Statute, Title 40, Section 218, contrary to the decisions of the Supreme Court of Kansas; (b) contrary to the decisions of the United States Court of Appeals for the Fifth Circuit, and (c) contrary to four decisions of the Supreme Court of the United States hereinbefore referred to.

(2) In refusing to follow the decisions of the Supreme Court of the United States as hereinbefore set out and the decisions of the United States Court of Appeals for the

Fifth Circuit, and the decisions of the Supreme Court of Kansas, all as set out, *supra.*

PRAYER

WHEREFORE, petitioners, and each of them, pray that a writ of *certiorari* be issued by this Court directed to the United States Court of Appeals for the Tenth Circuit to the end that the final opinion and judgments of said United States Court of Appeals for the Tenth Circuit, in said causes as consolidated, *The Travelers Fire Insurance Company, a corporation appellant,* V. *Ranney-Davis Mercantile Company, a corporation, appellee,* No. 3795; *New York Underwriters Insurance Company, a corporation, appellant,* V. *Ranney-Davis Mercantile Company, a corporation, appellee,* No. 3796; and *Grain Dealers National Mutual Fire Insurance Company et al., appellants* V. *Ranney-Davis Mercantile Company, a corporation, appellee,* No. 3797, be reviewed by this Court as provided by law, and that upon such review, said decree be reversed, and that petitioners have such other relief as to this Court may seem appropriate.

F. A. RITTENHOUSE,
Counsel for Petitioners.

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JOCHEMS, SARGENT & BLAES,
Of Counsel.

MAY 2, 1949.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit in said causes as consolidated, *The Travelers Fire Insurance Company, a corporation, appellant* v. *Ranney-Davis Mercantile Company, a corporation, appellee; New York Underwriters Insurance Company a corporation, appellant* v. *Ranney-Davis Mercantile Company, a corporation, appellee,* and *Grain Dealers National Mutual Fire Insurance Company, a corporation et al., appellants* v. *Ranney-Davis Mercantile Company, a corporation, appellee,* which petitioners here seek to have reviewed, is not yet officially reported but appears on Pages 339 to 352, inclusive, of the printed Transcript of Record filed herewith.

STATEMENT OF THE CASE

The essential facts of the case are fully stated in petitioners' petition for writ of *certiorari,* and in the interest of brevity, are not repeated here. Reference will be made thereto in the argument which follows.

SPECIFICATIONS OF ERROR TO BE URGED

Petitioners, and each of them, say that the United States Court of Appeals for the Tenth Circut has erred, as follows:

1. (a) In interpreting the Kansas Statute, Title 40, Section 218, contrary to the decisions of the Supreme Court of Kansas; (b) contrary to the decisions of the United States Court of Appeals for the Fifth Circuit and (c) contrary to four decisions of the Supreme Court of the United States as hereinbefore referred to.

2. In refusing to follow the decisions of the Supreme Court of the United States as hereinbefore set out and the decisions of the United States Court of Appeals for the Fifth Circuit and the decisions of the Supreme Court of Kansas, all as set out *supra*.

SUMMARY OF THE ARGUMENT

The summary of the argument is set out in the petition for writ of *certiorari* under the title "Jurisdiction of this Court" and, for the sake of brevity, will not be restated here as the same will be covered in detail under the argument as follows:

ARGUMENT

The United States Court of Appeals for the Tenth Circuit should have reversed the decision of the trial court and held that the United States District Court for the District of Kansas, Second Division, was without jurisdiction and that the purported service of summons upon the Commissioner of Insurance of the State of Kansas was void for the reason that the causes of action, if any, were based upon transactions had wholly in the State of Oklahoma and no part of the causes of action of the respondent arose out of

or by reason of the transaction of any business in the State of Kansas.

This is an application for writ of *certiorari* for a review of the judgment and decision of the United States Court of Appeals for the Tenth Circuit in affirming the judgment and decision of the United States District Court of the District of Kansas, Second Division, wherein judgment was entered in favor of the respondent, Ranney-Davis Mercantile Company, and against each of the petitioners herein, as follows:

The Travelers Fire Insurance Company	$ 5,036.85
New York Underwriters Insurance Company	5,036.85
The several mutual companies	10,073.70

The policies of each of the petitioners were issued in Oklahoma, countersigned by Oklahoma agents, and insured property of Ranney-Davis Mercantile Company located in Woodward, Oklahoma, against the hazard of fire and tornado, total insurance, fire and tornado, $24,000.00, and each policy contained a 90% co-insurance clause.

The insuring clause of the policies insured Ranney-Davis Mercantile Company, Woodward, Oklahoma (Tr. 24).

Ranney-Davis Mercantile Company is a corporation organized under the laws of the State of Kansas and admitted to do business in the State of Oklahoma. Each of the fire insurance companies, petitioners herein, are corporations organized under the laws of States other than the States of Kansas and Oklahoma, but each was admitted to

do business in the State of Kansas and in the State of Oklahoma (Tr. 4 Complaint and Exhibits).

On April 9, 1947, a tornado destroyed in part this building. The basement floor, walls and ceiling were of reinforced concrete and the superstructure was of brick and mill work construction, and all that part of the building above the reinforced concrete ceiling of the basement, and which formed the floor for the superstructure was destroyed (Tr. 222). Being a partial loss, the 90% co-insurance clause applies, under which the insured is a co-insurer to the extent that 90% of the value of the building exceeds the insurance in force.

The dispute arose by reason of this 90% co-insurance clause. No settlement being reached, Ranney-Davis Mercantile Company instituted suit against your petitioner, The Travelers Fire Insurance Company, in the United States District Court at Wichita, Kansas (Complaint Tr. 4). The policy is attached as Exhibit "A" (Tr. 13); 90% co-insurance clause (Tr. 22); Ranney-Davis Mercantile Company Endorsement (Tr. 24); which insures Ranney-Davis Mercantile Company, Woodward, Oklahoma; Uniform Standard Form No. 60 (Tr. 32) shows company insured in agency at Woodward, name of The Travelers Fire Insurance Company and coverage on property located on Lot 3, Block 58, East Woodward, Oklahoma, etc. The reference to other exhibits appears (Tr. 34).

Summons was issued November 25, 1947 (Tr. 36), and served upon Frank Sullivan, Commissioner of Insur-

ance of Kansas, on November 29, 1947, the return appearing (Tr. 36-37).

The Travelers Fire Insurance Company filed special appearance motion (Tr. 37), seeking to quash service upon it had through the Commissioner of Insurance of the State of Kansas and, as grounds therefor, alleged:

> "(1) That this movant is a corporation organized and existing under and by virtue of the laws of the State of Connecticut.
>
> "(2) That the purported service in this cause was directed to and served upon Frank Sullivan, Commissioner of Insurance of the State of Kansas, statutory service agent for this movant in the State of Kansas.
>
> "(3) That this movant, as a condition upon its doing business in the State of Kansas, was required to appoint the said Frank Sullivan, Commissioner of Insurance of the State of Kansas, its statutory service agent, and that such appointment is an appointment of a service agent only for the service of process in matters arising in the State of Kansas, or arising out of or by reason of business transacted in the State of Kansas.
>
> "(4) That the cause of action set forth in plaintiff's complaint is an action, if any, arising upon a policy issued in the State of Oklahoma, insuring property in the State of Oklahoma, and that no part of the plaintiff's cause of action arises out of or by reason of the transaction of any business in the State of Kansas."

On February 2, 1948, the Honorable Royce H. Savage, United States District Judge assigned to hear this cause, entered an order (Tr. 38) overruling this special appearance motion upon the ground that the cause of action stated in the complaint arose in the State of Kansas, and therefore that service of summons upon the statutory service agent of the defendant, appointed pursuant to the mandate of the Kansas statute, was sufficient to give the court jurisdiction.

The same motion and order was made with reference to each of the other defendants. Reference to complaint in *New York Underwriters Insurance Company case* (Tr. 46), summons and return (Tr. 47), and reference to order (Tr. 48).

The suit against the Grain Dealers National Mutual Fire Insurance Company *et al.*, was filed in the State Court (Tr. 49 to 66) and special appearance motion on behalf of each mutual company was filed in the State Court, and raised the same points (Tr. 60), and the order of Judge Savage is referred to (Tr. 66) and is set out in the printed transcript Page 38.

Answers as filed by each petitioner, all being similar or identical. The answer of The Travelers Fire Insurance Company is set out in the Transcript, Page 39, joining issue without waiving the question of jurisdiction.

The cases, as consolidated, were called for trial on June 2, 1948, at Wichita, Kansas, before the Honorable Arthur J. Mellott, United States District Judge for Kansas (Tr. 84), whereupon the question of jurisdiction was again raised and the opinion of Judge Savage was allowed to stand for the time being (Tr. 85). The jurisdictional question was again raised by motion for new trial (Tr. 67) in the cases 3259, 3260, 3278, as consolidated. The transcript of proceedings on motion for new trial is set out, beginning on Page 69 of the Transcript. On July 12, 1948, Judge Mellott, in also overruling the special appearance motions (Tr. 72), held that the causes of action did not arise in Kansas, as held by Judge Savage, and then said:

"The court does not agree with that view, but it does believe that it has jurisdiction and that the motion to quash or dismiss was properly denied by Judge Savage. The cases relied upon by the defendant to support a contrary view seem to be bottomed largely upon this theory; namely, that this service statute is not sufficient to give this court jurisdiction to resolve the controversy raised by the complaints in these cases. The cases upon which defendants rely recognize that when an insurance company consents to be sued in the courts of a state, that it is bound by the construction of the Supreme Court of the state as to all of the attendant liabilities under such a statute. Learned counsel for the defendants recognizing that, relies upon the case of *Life Association* v. *Boyer*, reported in 62 Kans. at Page 31, as establishing the view that a Kansas court has no jurisdiction to determine controversies arising upon a contract of insurance written in some state other than Kansas, and he also relies upon *Shearer* v. *Insurance Company*, reported in 106 Kans. 574. A sentence in the latter case is: 'That statutes providing for service of summons upon a foreign corporation by the delivery of a copy to a public officer, are intended for the benefit of residents of the state and are not available to non-residents' and also, 'That in order for effective service to be in such manner, that cause of action must have arisen in the State.'

"There is, of course, no language in the service statute applicable here, requiring categorically that the cause of action sued upon must arise in the State of Kansas. The statute itself is in the disjunctive, and it provides, 'Suit may be instituted in the proper court of any county in this state in which the cause of action shall arise or (emphasis supplied by the Court) in which the plaintiff may reside, by the service of process on the Commissioner of Insurance of this State.'

"The present causes of action and suits, it seems to this court, were 'instituted in the proper court of any county * * * in which the plaintiff in this action resides.' That being so, the court thinks that by the service of process in the manner that it was made in this case, that this court has jurisdiction of the contro-

versy and it so holds. It finds, therefore, that the special appearance and motion to dismiss was rightly overruled by Judge Savage, and that the case was properly before it under the pleadings as made up at the time of the trial. In other words, this court adheres to the view expressed by Judge Savage, that the service of process in this case, and in each of the cases, was and is sufficient to give the court jurisdiction of the person of the defendant and the special appearances and motions to quash of the defendants were properly overruled."

Transcript of the proceedings and evidence in the cause appears in full (Tr. 84 to 338), including the answers to special questions submitted to the jury (Tr. 336). Journal entry of judgment (Tr. 79); notice of appeal (Tr. 81). Statement of points upon which appellants relied in the United States Court of Appeals for the Tenth Circuit (Tr. 82-83), and the order extending time to file and docket record on appeal (Tr. 83).

The opinion of the United States Court of Appeals for the Tenth Circuit (Tr. 339) affirming the judgment entered by the United States District Court for the District of Kansas, Second Division (Tr. 352), order staying mandate issued April 4, 1949, by the Honorable Orie L. Phillips (Tr. 352), Clerk's certificate, signed by Robert B. Cartwright, Clerk of the United States Court of Appeals, Tenth Circuit (Tr. 353).

The motion to quash appears in the Transcript, Page 37.

The undisputed facts show that Ranney-Davis Mercantile Company is a Kansas corporation and duly admitted to transact business in Oklahoma and that it owns the property involved in this action located at Woodward, Okla-

homa; that the petitioners, and each of them, are insurance companies and each organized under the laws of States other than that of Kansas and Oklahoma; that each was admitted to transact business in Kansas and in Oklahoma; that the policies of insurance sued upon herein were each the standard Oklahoma statutory form, each issued in Oklahoma, by Oklahoma agents, and each covered property located at Woodward, Oklahoma, and each bore the Ranney-Davis Mercantile Company endorsement which insured Ranney-Davis Mercantile Company of Woodward, Oklahoma. That on April 9, 1947, the property at Woodward, covered by these policies, was damaged and partially destroyed by windstorm. A dispute arose as to the application of the 90% co-insurance clause and Ranney-Davis Mercantile Company being unwilling to accept less than $24,000.00, the total of insurance under all policies on said building, instituted suit in the United States District Court at Wichita against The Travelers Fire Insurance Company for $6,000.00; the New York Underwriters Insurance Company for $6,000.00, and in the District Court of Cowley County, Kansas, instituted suit against the Grain Dealers National Mutual Fire Insurance Company *et al.*, for $12,000.00. This suit was removed to the Federal Court and all three cases were consolidated and heard together. This was true, also, as to the special appearances and motions to quash.

Upon a hearing before the Honorable Royce H. Savage, the motions were overruled upon the ground that the causes of action arose in the State of Kansas (Tr. 38-39). However, when the question was presented to the Honorable

Arthur J. Mellott, he declined to follow the ruling of Judge Savage on that point (Tr. 72-73), but sustained Judge Savage on the ground that he (Judge Mellott) had the right to construe and interpret the Kansas statute dealing with the appointment of a statutory agent for service by a foreign insurance corporation. This ruling we submit is erroneous under the decisions of the Supreme Court of the United States and under the decisions from other United States Courts of Appeals, and the decisions of the Supreme Court of Kansas.

The United States Court of Appeals for the Tenth Circuit held that both the trial judges were correct (Tr. 339-352).

The statutes of Kansas require a foreign insurance company, upon admission to do business therein, to appoint the Commissioner of Insurance as service agent upon whom process may be served and the statute itself restricts such process to business transacted in Kansas. Title 40, Section 218, Kansas Statutes, provides as follows:

> "Every insurance company, or fraternal benefit society, *in applying for authority to transact business in this state, and as a condition precedent to obtaining such authority,* shall file in the insurance department its written consent, irrevocable, that actions may be commenced against such company or fraternal benefit society in the proper court of any county in this state in which the cause of action shall arise or in which the plaintiff may reside by the service of process on the commissioner of insurance of this state, and stipulating and agreeing that such service shall be taken and held in all courts to be as valid and binding as if due service had been made upon the president and secretary of the company, authenticated by the seal of the corporation,

and shall be accompanied by a duly certified copy of the order or resolution of the board of directors, trustees or managers authorizing the president and secretary to execute the same. * * *"

Under this statute we contend there are two propositions to be considered in arriving at a proper conclusion as to its meaning and intent, and that the Supreme Court of Kansas has expressed itself on both (a) the business affected or controlled by the statute, and (b) venue of actions in suits brought "in the proper court of any county in this State in which the cause of action shall arise, or in which the plaintiff may reside, by the service of process on the Commissioner of Insurance of this State," etc.

The Act has reference to allowing the insurance company to do an insurance business in Kansas and therefore has reference to Kansas business and service of process when suits are instituted in the proper court and involve losses or causes of action arising by reason of any business transacted by such admitted company in the State of Kansas. When the cause of action arises by reason of business done in the State of Kansas by such company, then the statute fixes the venue of such action as (a) in the county where the loss occurred, or (b) in the county of the residence of the assured.

SUPREME COURT OF KANSAS DECISIONS

In *Shearer* v. *Farmers' Life Ins. Co.*, 106 Kans. 574, 189 Pac. 648, the court held that if there were no loss in Kansas and there were no residence in Kansas, that an action could not be maintained. Those were the facts involved

in that case, no loss in Kansas and no residence in Kansas. In the body of the opinion the court said:

> "That statutes providing for service of summons upon a foreign corporation by the delivery of a copy to a public officer, are intended for the benefit of residents of the state and are not available to non-residents and *that in order for effective service to be in such manner, the cause of action must have arisen in the state.*"

Therefore, we say that in this case the Supreme Court of Kansas has construed the statute and the construction is binding upon the Federal Courts. See authorities cited in petition for writ of *certiorari* under the title "Jurisdiction of this Court."

In *Mutual Reserve Fund Life Ass'n* v. *Boyer*, 62 Kans. 31, 61 Pac. 387, the Supreme Court of Kansas, in discussing that case and construing the statute providing for service upon the Commissioner of Insurance, said:

> "With the withdrawal of the insurance company from the state, the subject matter in respect to which the power was conferred, to-wit, *the business here transacted by the company*, terminated; and with the probable exception above mentioned, the company ceased to be amenable to our jurisdiction."

In the case of *Buchanan* v. *Iowa State Live Stock Ins.* Co., 108 Kans. 520, 196 Pac. 249, the Supreme Court of Kansas there quoted with approval the quotation above set forth from the *Mutual Reserve Fund Association case.*

Thus, in a very early case, the Supreme Court of Kansas held that the subject matter in respect to which the right to serve process upon the commissioner of insurance is in respect to suits growing out of business transacted in the State of Kansas and that holding was affirmed in the 108

Kans. 520, and the same principle was laid down in the 106 Kans. 574.

The Supreme Court of the United States, as well as the United States Court of Appeals for the Fifth Circuit, has held that under similar circumstances the plaintiff could not obtain service of summons upon the statutory service agents of a foreign corporation in one state where the loss arose out of business transacted in another state.

The question involved is one of service of process and the United States Court of Appeals, as well as the trial court, confused it with the matter of venue.

Under Section 51 of the Judicial Code, Title 28, Section 112, U.S.C.A., and the new Judicial Code, Title 28, Section 1391, suits may be brought in the district of the residence of either the plaintiff or defendant, but after venue is laid the question of proper service arises as in the instant case. Here, the service of process on the Commissioner of Insurance is void as the suits involve an Oklahoma loss, on Oklahoma policies of insurance covering property in Oklahoma, all policies issued to Ranney-Davis Mercantile Company, Woodward, Oklahoma, and service of process on the statutory agent of the foreign insurance companies may be had in Kansas only in cases arising on business transacted in the State of Kansas.

UNITED STATES COURT OF APPEALS DECISIONS

In the case of *Knobloch* v. *M. W. Kellogg Co.*, 154 Fed. (2d) 45, the United States Court of Appeals for the Fifth Circuit, after stating the case held in conformity to

our contentions. The plaintiff, a citizen of Louisiana, brought suit in the Southern District of Texas against a citizen of Delaware and a citizen of Connecticut. His cause of action arose under the Workmen's Compensation Law of Louisiana. *Held,* that although the defendants were admitted to and were doing business in Texas, nevertheless, because the action did not arise in Texas, or out of facts having any relation to the business there being carried on, the service on the statutory agent of these foreign corporations could not be had. The court, in the opinion, said:

> "There being no state decision on the subject, we reject the appellant's contention, and construe the Texas statute to apply only to causes of action arising within the state, or out of facts relating to business therein transacted."

The appellant in that case relied upon *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 60 S. Ct. 153, 84 L. ed. 167, 128 A.L.R. 1437, and *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.*, 308 U.S. 530, 309 U.S. 4, 60 S. Ct. 215, 84 L. ed. 537. In those cases it was held that a foreign corporation admitted to do business in another state might sue and be sued in the Federal Court where admitted. This rule was taken care of in the new Judicial Code, Title 28, Section 1391, but has no bearing upon the issues here involved.

UNITED STATES SUPREME COURT DECISIONS

There are four decisions of the Supreme Court of the United States that sustain us in our contention that service upon the Commissioner of Insurance of the State of Kansas,

in suits filed in Kansas against foreign insurance companies on fire insurance policies issued in Oklahoma, on Oklahoma standard forms, by Oklahoma agents and covering property located in Oklahoma and issued to Ranney-Davis Mercantile Company, Woodward, Oklahoma, does not confer jurisdiction upon the courts in Kansas over such foreign insurance companies and that in these actions, as consolidated, the United States District Court at Wichita was without jurisdiction to enter the judgment there entered and that the United States Court of Appeals for the Tenth Circuit, in affirming said judgments, committed error.

In *Simon* v. *Southern Railway Co.*, 236 U.S. 115, 35 S. Ct. 255, 59 L. ed. 492, it was held that service of process on a state officer designated by the Louisiana statute for that purpose is not effective to give a court of that state jurisdiction of a suit against a foreign corporation doing business within the state as to a cause of action arising in another state. In the opinion the court said:

> "Subject to exceptions, not material here, every state has the undoubted right to provide for service of process upon any foreign corporations doing business therein: to require such companies to name agents upon whom service may be made; and also to provide that in case of the company's failure to appoint such agent, service, in proper cases, may be made upon an officer designated by law. *Mutual Reserve Fund Life Ass'n* v. *Phelps*, 190 U.S. 147, 47 L. ed. 987, 23 S. Ct. Rep. 707; *Connecticut Mut. Life Ins. Co.* v. *Spratley*, 172 U.S. 603, 43 L. ed. 569, 19 S. Ct. Rep. 308. But this power to designate by statute the officer upon whom service in suits against foreign corporations may be made *relates to business and transactions within the jurisdiction of the state enacting the law.* Otherwise, claims on contracts, wherever made, and suits for torts,

wherever committed, might, by virtue of such compulsory statute, be drawn to the jurisdiction of any state in which the foreign corporation might at any time be carrying on business. The manifest inconvenience and hardship arising from such extraterritorial extension of jurisdiction by virtue of the power to make such compulsory appointments could not defeat the power if in law it could be rightfully exerted. But these possible inconveniences serve to emphasize the importance of the principle laid down in *Old Wayne Mut. Life Ass'n* v. *McDonough*, 204 U.S. 22, 51 L. ed. 351, 27 S. Ct. Rep. 236, that the statutory consent of a foreign corporation to be *sued does not extend to causes of action arising in other states.*"

In *Old Wayne Mutual Life Ass'n* v. *McDonough*, 204 U.S. 8, 27 S. Ct. 236, 51 L. ed. 345, the policy sued upon was executed in Indiana and the suit brought in Pennsylvania and personal judgment was entered against the Indiana corporation. Process was served upon the insurance commissioner. The insurance company entered Pennsylvania and transacted business therein without appointing the statutory agent upon whom process might be served. The Supreme Court of the United States, in holding that the judgment "was void as wanting in due process of law," said:

> "Conceding, then, that by going into Pennsylvania, without first complying with its statutes, the defendant association may be held to have assented to the service upon the insurance commissioner of process in a suit brought against it there in respect of business transacted by it in that commonwealth, such assent cannot properly be implied where it affirmatively appears as it does here, that the business was not transacted in Pennsylvania."

In *Robert Mitchell Furniture Co.* v. *Selden Breck Construction Co.*, 257 U.S. 213, 42 S. Ct. 84, 66 L. ed. 201,

the trial court held service on the statutory agent to be void and the appeal was on that ground alone. The action was filed in Ohio by an Ohio corporation upon a contract made with the defendant, a Missouri corporation, to deliver "f.o.b. cars Ann Arbor, Michigan," specified woodwork for a library building at the University of Michigan. The defendant had appointed a statutory agent and had been admitted to transact business in Ohio. The contract in question was made by correspondence and was not related to any business defendant had done in Ohio. The court, in passing upon the question, in part, said:

> "The purpose of requiring the appointment of such an agent is primarily to secure local jurisdiction in respect of business transacted within the state. * * *."

In *Morris & Company* v. *Skandinavia Insurance Co.*, 279 U.S. 405, 49 S. Ct. 360, 73 L. ed. 762, the policy was issued and the loss occurred in South America and suit instituted in Mississippi. In holding service void, the Supreme Court of the United States said:

> "The purpose of state statutes requiring the appointment by foreign corporations of agents upon whom process may be served is primarily to subject them to the jurisdiction of local courts in controversies growing out of transactions within the state. *Old Wayne Mutual Life Ass'n* v. *McDonough*, 204 U.S. 8, 18, 21, 51 L. ed. 345, 349, 350, 27 S. Ct. Rep. 236; *Simon* v. *Southern Ry. Co.*, 236 U.S. 115, 130, 59 L. ed. 492, 500, 35 S. Ct. Rep. 255; *Robert Mitchell Furniture Co.* v. *Selden Breck Constr. Co.*, 257 U.S. 213, 215, 66 L. ed. 201, 203, 42 S. Ct. Rep. 84; *Louisville & N. R. Co.* v. *Chatters*, 279 U.S. 320, *ante*, 711, 49 S. Ct. Rep. 329. The language of the appointment and of the statute under which it was made plainly implies that the scope of the agency is intended to be so limited. By the terms of both, the authority continues only so long as any liability of the company remains

outstanding in Mississippi. No decision of the state supreme court supports the construction for which petitioner contends. And, in the absence of language compelling it, such a statute ought not to be construed to impose upon the courts of the state the duty, or to give them power, to take cases arising out of transactions so foreign to its interests. The service of the summons cannot be sustained."

We respectfully submit that the service in the instant case is void and that the United States District Court for the District of Kansas, Second Division, was without jurisdiction over the person of the petitioners, and each of them, and that the United States Court of Appeals for the Tenth Circuit erred in holding the service good, and that this Honorable Court should grant *certiorari* herein and reverse the judgment of the United States Court of Appeals for the Tenth Circuit and direct it to issue judgments that the United States District Court for the District of Kansas, Second Division, was without jurisdiction to hear and determine the cases and to enter judgment herein.

Respectfully submitted,

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